Supreme Court, U. S.
FILED
SEP 5 1979
MICHAEL ROBAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-368

THE LAW FIRM OF CALIG AND WATERMAN; JOSEPH WATERMAN AND SAMUEL L. CALIG,

Petitioners,

vs.

SUPREME COURT OF OHIO; OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO; WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO; BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO; OHIO STATE BAR ASSOCIATION; COLUMBUS BAR ASSOCIATION AND THE STATE OF OHIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the proceeding on June 8, 1979.

OPINIONS BELOW

The judgment of the Supreme Court of Ohio in the original action for declaratory relief has not yet been reported; however, the judgment entry appears in Appendix A to this Petition.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 8, 1979. This Petition has been filed within 90 days of that date. This Court has jurisdiction by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, consistent with the First and Fourteenth Amendments to the United States Constitution as construed by this Court, a state can prevent a lawyer or a law firm from using lawfully existing billboards for the purpose of disseminating truthful advertising about the availability, nature and prices of legal services?

2. Whether, consistent with the First and Fourteenth Amendments to the United States Constitution as construed by this Court, a state can restrict the dissemination of truthful information concerning the availability and terms of legal services where neither a substantial relationship to an important state interest nor even a rational basis has been asserted or is apparent to justify such restriction?

3. Whether a state supreme court denies procedural due process to litigants when it claims original and exclusive jurisdiction over a case raising a substantial federal constitutional issue and then dismisses such constitutional claim without a hearing on either fact or law and without an opinion?

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

United States Constitution, Fourteenth Amendment, § 1

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Code of Professional Responsibility, Disciplinary Rule 2-101(B):

> "In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and surburban directories, law directories and law lists. . . ."

STATEMENT OF THE CASE

Petitioners brought an original action for a declaratory judgment in the Ohio Supreme Court that Ohio Disciplinary Rule 2-101 is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.[1] That rule prohibits lawyers from advertising on billboards irrespective of the form and content of the advertisement and irrespective of the fact that the billboard is already in lawful existence and available for all other forms of lawful expression.

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[1] The Ohio Supreme Court is authorized to issue declaratory judgments. Ohio Rev. Code, Chapter 2721.

The complaint alleged, *inter alia,* that "the plaintiffs are now engaged in the practice of law at Columbus, Ohio, and [that] they provide legal services at modest fees to persons of middle income who do not qualify for governmental legal aid." (Amended complaint, item 4.)

It further alleged that "plaintiffs plan to make substantial use of said billboard media in a manner consistent with good taste in maintaining the highest standards and dignity of the legal profession and meticulously complying with the remaining Supreme Court Guidelines, just as soon as plaintiffs' right to do so is established."[2] (Amended complaint, item 7.)

Plaintiffs also alleged that many persons in need of legal services of the types offered by plaintiffs "do not regularly read newspapers or watch television and, therefore, are not reachable through the other forms of media in which lawyer advertising is permitted by the Disciplinary Rules." (Amended complaint, item 7.)

Ohio Disciplinary Rule [for lawyers] 2-101 permits advertising by lawyers and sets forth strict guidelines to insure that such advertising is not "false, fraudulent, misleading, deceptive, self-laudatory or unfair." (DR2-101 (A), *et seq.*)

The rule, however, goes on to absolutely bar billboard advertising even though such advertising in form and content complies with all of the rules designed to guarantee honesty and fairness and would be permissible in other media including radio, television, newspapers and magazines. (DR2-101(B).)

The only state interest that has been offered to justify this absolute proscription on the use of billboards for

[2] None of the defendants challenged petitioners' standing tc sue. Petitioners' *bona fides* is confirmed by the fact that petitioners' currently use radio, television and newspapers to advertise their legal services.

lawyer advertising is the subjective opinion that billboard advertising, irrespective of context and content, is *per se* "beneath the dignity of the bar." (Ohio Attorney General's Memorandum in the Ohio Supreme Court.) Petitioners contended that this subjective and debateable judgment was insufficient to justify impingement on speech protected by the First and Fourteenth Amendments to the United States Constitution. See *Bates v. State Bar of Arizona,* 443 U.S. 350 (1977) and other cases cited *infra* this petition.

The Ohio Attorney General moved to dismiss the complaint for failure to state a claim for which relief could be granted. The Attorney General argued in effect that the rule is valid as a matter of law. The petitioners filed memoranda in opposition to such motion and suggested the need for an evidentiary hearing. On June 8, 1979, the Ohio Supreme Court dismissed the complaint herein without a hearing on either fact or law and without an opinion. The petitioners had brought this suit as an original action in the Ohio Supreme Court because that court claims "exclusive and absolute" jurisdiction over matters concerning the governance of the Bar in Ohio, see *infra.* Hence, petitioners have never had a hearing anywhere on the Federal constitutional claim asserted herein.

REASONS FOR GRANTING THE WRIT

1. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION NOT YET RESOLVED BY THIS COURT; NAMELY, WHAT STANDARD OF REVIEW IS APPLICABLE IN DETERMINING THE VALIDITY OF A STATE REGULATION OF COMMERCIAL SPEECH.

Commercial speech is now clearly protected by the First and Fourteenth Amendments to the United States

Constitution, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Lindmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).

Political speech can be regulated only for reasons of the most compelling nature. *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Kusper v. Pontikes*, 414 U.S. 51 at 58 (1973). No "compelling state interest" is served by prohibiting lawyer advertising on billboards, lawfully existing and available for all other forms of speech, where the same advertising is permitted by the state rule on radio, television and in media such as newspapers and magazines.

Commercial speech does not enjoy the exact same degree of protection as political speech. *Ohralik v. Ohio State Bar Assn., supra*, 436 U.S. at 455-456. However, since commercial speech is protected, any regulation of it must have something more to support it than merely a rational basis. *Lindmark Associates, Inc. v. Willingboro, supra*, 431 U.S. at 96-97. The asserted basis of the regulation here in question, that billboards are inherently "beneath the dignity of the bar," scarcely rises even to the level of a rational basis. Certainly, judged by any more exacting level of scrutiny than "rational basis" the regulations must fail. This case provides the Court with a vehicle to articulate the appropriate standard of review in commercial speech cases.

2. THE QUESTION PRESENTED BY THIS PETITION HAS BEEN DECIDED BY THE SUPREME COURT OF THE STATE OF OHIO IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

Lindmark Associates, Inc. v. Willingboro, supra, is a case quite analogous to this case. There the subject was a ban on "for sale" signs in front of houses. Some of the

same arguments that were made unsuccessfully in support of that ordinance were used to justify this rule in the court below.

In both cases, it was argued that since there were alternative channels of communication these were valid "time, place and manner" regulations. In *Lindmark*, this court responded:

> "That the proscription applies only to one mode of communication, therefore, does not transform this into a time, place and manner case." 431 U.S. at 94.

The court noted there that the ordinance was not concerned with lawn signs *per se* but only with certain messages placed upon lawn signs. Here the rule is not concerned with billboards *per se* – it does not prevent anyone from placing a billboard anywhere he wants – it is rather concerned with keeping certain messages, namely lawyer advertising, off of billboards. This court has held that true time, place and manner regulations are those that can be ". . . justified without reference to the context of the regulated speech. . . ." *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 at 771 (1976).[a]

In *Lindmark*, the state interest in preventing "white flight" was significant but the court was not convinced the ordinance was necessary to achieve it. Here preserving the dignity of the bar is an important state interest but it is by no means clear that this rule bears a substantial relationship to that interest. In fact, the concept behind

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[a] The Ohio Attorney General below suggested that these time-tested rules had been changed by the decision in *Young v. American Mini-Theatres*, 427 U.S. 50 (1976). This is hardly likely since *Virginia Pharmacy Board* was decided the same year as *Young*. Furthermore, *Lindmark Associates* was decided later than *Young*. Finally, the portion of the *Young* opinion upon which the Attorney General relied below, Part III, was only supported by four justices. See the concurring opinion of Justice Powell, 427 U.S. at 73.

this rule seems to be the same one this court rejected in *Bates*.

> "[The] postulated connection between advertising and the erosion of true professionalism is severely strained. At core, the argument presumes that attorneys must conceal from themselves and from their clients the real life fact that lawyers earn their livelihood at the bar." 433 U.S. at 368.

The court below neither took evidence nor rendered an opinion on this challenge.[4] This court should grant the writ at least for the purpose of determining if the Ohio Supreme Court is following this court's precedents.

3. DUE PROCESS REQUIRES THAT SUBSTANTIAL CONSTITUTIONAL CHALLENGES TO STATE LAW BE COGNIZABLE IN SOME COURT OR BEFORE SOME TRIBUNAL CAPABLE OF AFFORDING A HEARING.

The Ohio Supreme Court claims "exclusive and absolute" authority over matters relating to the governance of the bar. *Smith v. Kates*, 46 Ohio St. 2d 263 at 266 (1976). Therefore, this action had to be commenced in that court. The Federal and state constitutional claims were substantial (see reasons 1 and 2) and the petitioners made certain factual allegations proof of which would support this claim. Nevertheless, the Ohio Supreme Court without hearing any evidence or oral argument on the law, dismissed the action *without opinion*.

Petitioners contend that a state court cannot abrogate to itself exclusive jurisdiction over substantial constitu-

[4] It should be noted that noble causes such as the Heart Fund and the American Cancer Society and candidates for office, including judicial office, advertise on billboards with no apparent damage to their dignity.

tional claims, and then dismiss such claims without a hearing or opinion.

It is axiomatic that procedural due process requires that before one be deprived of a fundamental right or interest by a state one be offered a hearing. See e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); cf. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 at 84 (1936) (Brandeis, Jr., concurring).

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. Petitioners submit that the summary dismissal of a complaint without stated reasons and without either an evidentiary hearing or oral argument, is not a "hearing."

In the context of an administrative hearing, the court made the following comment:

> "The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a "full hearing" – a fair and open hearing – requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1 at 18.

See also *Willner v. Committee on Character*, 373 U.S. 96 (1962).

This court should at least issue a writ for the limited purpose of or instructing the Ohio Supreme Court to hold a hearing or explain its reasons for dismissal.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE STATE OF OHIO, CITY OF COLUMBUS	1979 Term To wit: June 8, 1979
Calig and Waterman et al., *Relators,*	No. 79-394 ACTION FOR DECLARATORY RELIEF
vs.	
Supreme Court of Ohio et al., *Respondents.*	

This cause originated in this court on the filing of a complaint for declaratory relief and was considered in the manner prescribed by law. On consideration thereof, it is ordered by the court that this cause be dismissed, sua sponte.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 8th day of June, 1979.

THOMAS L. STARTZMAN, Clerk
By /s/ SAM F. ADKINS, Deputy

Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1979

Case No. 79-368

THE LAW FIRM OF CALIG AND WATERMAN, et al.,
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SUPREME COURT OF OHIO, et al.,
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THE LAW FIRM OF CALIG AND WATERMAN, et al.,
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SUPREME COURT OF OHIO, et al.,
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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners filed an original action in the Supreme Court of Ohio seeking a declaratory judgment that Disciplinary Rule DR 2-101 (B) of the Code of Professional Responsibility, which governs advertising by attorneys in Ohio, is unconstitutional. The pertinent portion of the rule is set forth in the petition. It provides, in substance that an attorney may advertise in a dignified manner in print media or over radio or television. The definition of print media does not include billboards.

Petitioners alleged that they were engaged in the practice of law and wished to advertise the availability of their services on billboards. They claimed that the refusal to permit them to advertise on billboards violates their right to freedom of speech.

On June 8, 1979, the Supreme Court of Ohio, sua sponte, ordered that the cause be dismissed. The Order is set forth in the petition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners are not entitled to invoke the jurisdiction of this Court.

Petitioners did present their federal claim to the state court for determination. This is not sufficient, however, to entitle them to invoke the jurisdiction of this Court. They must also establish that their federal claim was either determined by the state court or that the judgment as rendered could not have been given without determining the federal claim.

> We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U.S. 206, 212-213 (1938).

See also Lynch v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934); *Adams* v. *Russell*, 229 U.S. 353, 360-361 (1913).

In the instant case the state court did not decide the federal question and petitioners cannot establish that the judgment of that court could not have been rendered without deciding it.

Petitioners attempted to invoke the original jurisdiction of the state supreme court to obtain a declaratory judgment. In their petition they claim that the Supreme Court of Ohio has "exclusive and absolute" authority over matters relating to the government of the bar citing *Smith* v. *Kates*, 46 Ohio St.2d 263 (1976). They also claim that Chapter 2721 of the Ohio Revised Code gives the Supreme Court of Ohio authority to grant declaratory judgments.

The Supreme Court of Ohio does have "exclusive and absolute" authority over all matters relating to the practice of law in Ohio. This does not mean, however, that a person may institute an original action in the Supreme Court of Ohio merely because the subject matter of the action relates to the practice of law. This is shown by the holding in *Smith* v. *Kates, supra*, 46 Ohio St.2d 263, the case relied upon by petitioners.

The *Smith case* involved two proceedings. The complainants in those proceedings, an individual and a corporation, sought to invoke the original jurisdiction of the Supreme Court of Ohio to obtain the removal and suspension of an attorney and a judge. The subject matter of the proceedings, misconduct by attorneys and judges, clearly relates to the practice of law. The Supreme Court of Ohio, however, dismissed the proceedings. It explained that disciplinary proceedings were governed by Rule V of the Rules for the Government of the Bar. Such proceedings could only be instituted by the filing of a complaint, signed by a member of the bar and certified by an officer of the state or a local bar association, with the Board of Commissioners on Grievances and Discipline.

Petitioners' claim that Chapter 2721 gives the Supreme Court of Ohio jurisdiction to grant declaratory judgments is foreclosed by applicable decisions of the state court. The statutes contained in that chapter do not confer jurisdiction on any court. They merely create a remedy which may be granted by a court which otherwise has jurisdiction.

> Statutes which create a declaratory judgment procedure do not extend the jurisdiction of the subject matter of a court but rather extend the power of the court to grant declaratory relief within its respective jurisdiction. In other words, declaratory judgment statutes provide an additional remedy which may be granted by a court but they do not extend the jurisdiction as to the subject matter upon which a court may act. *State ex rel. Neer* v. *Indus. Comm.*, 53 Ohio St.2d 22, 23, 371 N.E.2d 842, 843 (1978) quoting from *State ex rel. Foreman* v. *Bellefontaine Municipal Court,* 12 Ohio St.2d 26, 28, 231 N.E.2d 70,71 (1967).

See also Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

Jurisdiction is conferred upon the Supreme Court of Ohio by the Constitution. That jurisdiction cannot be limited or enlarged by statute. Paragraph one of the syllabus of *State* v. *Mansfield*, 89 Ohio St. 20, 104 N.E. 1001 (1913); *State ex rel. Cleveland Municipal Court* v. *Cleveland City Council*, 34 Ohio St.2d 120, 122, 296 N.E.2d 544, 547 (1973).

The original jurisdiction of the Supreme Court of Ohio is contained in Section 2(B) (1) of Article IV of the Constitution. That section, which is set forth as Appendix A, gives the court no jurisdiction in declaratory judgment.

The judgment of dismissal by the state supreme court might have rested, and under the applicable state law probably did rest, upon the ground that that court did not have original jurisdiction in declaratory judgment.

Respondents respectfully submit that, in this situation, this Court should refuse jurisdiction. *Stembridge* v. *Georgia*, 343 U.S. 541 (1952); *Phyle* v. *Duffy*, 334 U.S. 431, 444 (1948); *Woods* v. *Nierstheimer*, 328 U.S. 211, 214 (1946).

2. The petition does not present a substantial question.

Respondents submit that, even if this Court should find that the Supreme Court of Ohio did determine the merits of petitioners' federal claim, it should still refuse to take jurisdiction since the questions raised are not important enough to warrant review.

Petitioners argue that a decision upholding the validity of the challenged rule is not in accord with the decision in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85 (1977). Respondents respectfully submit that the *Linmark case* is readily distinguishable from the instant case.

Linmark involved an ordinance which prohibited "For Sale" and "Sold" signs. The township officials attempted to defend the ordinance on the ground that it merely restricted the time, place and manner of speech. This Court stated that such laws stand on a different footing from those prohibiting speech altogether. It found, however, that the ordinance was not a true time, place and manner restriction.

The ordinance did not leave open any practical alternative channels for communication. Real estate is not marketed through leaflets, sound trucks, demonstrations and the like. The only realistic alternatives for sellers are listing with real estate agents and newspaper advertising. Such methods involve more cost and less autonomy than yard signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for conveying the information. *Id.* at 93. Testimony showed that selling real estate without signs takes twice as long as selling with signs. *Id.* at 89.

In addition the ordinance was not genuinely concerned with the place or manner of the speech. It was aimed at the content of the speech, the message that the signs were intended to convey. The ordinance was enacted because the township feared that the information conveyed by the signs would cause the persons receiving such information to act upon it. *Id.* at 93-94.

The rule challenged in the instant case does leave open ample alternative channels for communication. Attorneys who wish to advertise the availability and cost of their services may do so over radio and television and in newspapers, magazines and other periodicals, telephone directories, city, county and suburban directories, law directories and law lists.

The rule is not aimed at the content of the speech. It is not concerned with the information which the advertising conveys but only with the manner--on billboards--in which it is conveyed. The rule expressly permits attorneys to convey the same information by all of the methods listed above.

The challenged rule merely regulates the manner in which attorneys may advertise their services. Such a regulation is permissible so long as it is imposed without reference to the content of the regulated speech, serves a significant governmental interest and leaves open ample alternative channels for the communication of the information. *Friedman* v. *Rogers*, _____U.S. _____, 99 S.Ct. 887, 894, 59 L.Ed.2d 100, 109-110 (1979); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977); *Virginia Pharmacy Board* v. *Virginia Consumers Council*, 425 U.S. 748, 771 (1976).

Petitioners claim that the rule is based upon the content of the speech. The sole basis for their claim is that the rule is only applicable to attorneys. If petitioners were correct it would invalidate any regulation of advertising by attorneys in this state. Such advertising is regulated by rules adopted by the Supreme Court of Ohio. These rules are necessarily limited to attorneys since the authority of that court is limited to matters relating to the practice of law. If such a limitation constitutes an impermissible restriction based upon the content of the advertising, there could be no permissible regulation of advertising by attorneys.

Respondents submit that petitioners are not correct and that they have misread the applicable decisions of this Court. The fact that the challenged rule is only applicable to attorneys does not mean that it is imposed with reference to the content of the speech. A content based restriction is one which is aimed at the communicative impact of the speech. The government singles out certain ideas or information for control or punishment either because of the specific viewpoint expressed or, as in the *Linmark case*, because of the effects produced by an awareness of the information conveyed. Tribe, *American Constitutional Law*, 580 (1978).

The challenged rule does not contain either of these vices. The restriction of billboard advertising is ideologically neutral. It is unaffected by whatever political, social, philosophical or other viewpoint the attorney may hold or whatever type of services he may wish to advertise.

The rule is not concerned with the effects produced by an awareness of the information conveyed. It expressly permits the same information to be conveyed through all of the more commonly used media. The rule is concerned solely with the manner--on billboards--in which such information is conveyed.

The governmental interests are particularly strong. In addition to the general public interest in consumer protection and the regulation of commercial transactions, the state bears a special responsibility for maintaining high standards among members of the licensed professions. The interest in regulating attorneys is especially great since attorneys are essential to the function of the administration of justice and have historically been officers of the courts. *Ohralik* v. *Ohio St. Bar Assn.*, 436 U.S. 447, 460 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

Petitioners claim that the state's interest in maintaining high professional standards for attorneys does not justify any restrictions on advertising. In support of their claim they cite *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 368.

Respondents submit that the fact that the state's interest in professionalism will not justify the suppression of all advertising by attorneys does not mean that it will not justify any limitation on the means which attorneys may use to obtain new clients. There is a vast difference between billboard advertising and other forms of advertising. Billboard advertising, for all practical purposes, has a captive audience. The billboard message is thrust upon the public. It is constantly before the people on the street and in cars and seen without the exercise of any choice of their parts. The same is not true of other forms of advertising. These forms are ordinarily seen only as a matter of choice. *Packer Corp.* v. *Utah*, 285 U.S. 101, 110 (1932); *Lehman* v. *Shaker Heights,* 34 Ohio St.2d 143 (1973), *aff'd,* 418 U.S. 298 (1974).

The interests of the petitioners are minimal. They do not contend that they wish to use billboards for political expression or as an exercise of associational freedom to secure constitutionally guaranteed civil rights. The only reason they wish to use billboard advertising is to obtain new clients. A lawyer's procurement of employment is a subject only marginally affected with First Amendment concerns. It falls within the state's proper sphere of regualtion. *Ohralik* v. *Ohio St. Bar Assn., supra,* 436 U.S. at 459.

The interests of the general public are also minimal. Billboard advertising does little if anything to promote informed and reliable decision making in the purchase of legal services. Billboards are not designed to convey factual information such as the availability and price of legal services. Their function is to furnish a reminder or repetition of a brand name in order to trigger or reinforce impressions already made in the prospect's mind concerning the product or service. The message contained on a billboard must be brief since it is only visible to the prospect for approximately five seconds. The ideal message contains from four to eight words. If the message is much longer, it will be virtually impossible for a motorist to read and comprehend it. Wright, Warner & Winter, *Advertising,* 212 and 318 (1971); Sandage & Fryburger, *Advertising Theory and Practice,* 514 (8th Ed. 1971); Engel, Wales & Warshaw, *Promotional Strategy,* 278 (Rev. Ed. 1971).

The rule allows ample alternative channels of communication for the information which petitioners wish to convey to the public. It expressly permits an attorney to advertise the services which he provides and their cost over radio and television and in newspapers, magazines, other periodicals, telephone directories, city, county and suburban directories, law directories and law lists.

The challenged rule regulates the manner in which attorneys may advertise their services. It is not imposed with reference to the content of the advertising; it serves significant governmental interests; and it leaves open ample alternative channels for the communication of the information. The validity of such a rule is clearly established by previous decisions of this Court, for example, *Friedman* v. *Rogers,* ____ U.S. _____, 99 S.Ct. 887, 894, 59 L.Ed.2d 100, 109-110 (1979); *Bates* v. *State Bar of Arizona,* 443 U.S. 350, 384 (1977); *Virginia Pharmacy Board* v. *Virginia Consumers Council,* 425 U.S. 748, 771 (1976). Petitioners' objections to the rule, therefore, present no substantial question for review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Section 2(B) (1), Article IV, Ohio Constitution

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 1979, three copies of the Respondents' Brief in Opposition were sent by United States first class mail, postage prepaid, to Stanley K. Laughlin, Jr., 2061 Fairfax Road, Columbus, Ohio 43221 and Joseph Waterman, 1187 East Broad Street, Columbus, Ohio 43205, Attorneys for Petitioners. I further certify that all parties required to be served have been served.

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Supreme Court, U. S.
FILED
OCT 18 1979
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-368

THE LAW FIRM OF CALIG & WATERMAN, ET AL.,

Petitioners,

vs.

SUPREME COURT OF OHIO, ET AL.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners submit a brief reply, in accordance with the rules of this Court, to address a matter raised for the first time in Respondents' brief in opposition to the petition for certiorari.

IN THEIR BRIEF IN THIS COURT, RESPONDENTS RAISE FOR THE FIRST TIME THE ARGUMENT THAT THE DECISION BELOW RESTED ON STATE GROUNDS. THOSE GROUNDS LACK FAIR AND SUBSTANTIAL SUPPORT AND ARE INADEQUATE TO BAR REVIEW BY THIS COURT.

In this Court, for the first time, Respondents suggest that the Ohio Supreme Court may have dismissed

the complaint below because Petitioners asked for declaratory relief rather than some other form of relief. That position is not supported by any fair reading of Ohio law and was not taken by Respondents below, even though Respondents included the Ohio Supreme Court itself.

The gravamen of the Petition in this case is a claim that the rules of the Ohio Supreme Court restricting lawyer advertising violate the First and Fourteenth Amendments to the United States Constitution; in essence a claim that the Ohio Supreme Court has in certain respects placed arbitrary restraints on free speech. (See points 1 and 2 of the Petition.) The Petition further contends that the Ohio Supreme Court has denied Petitioners' procedural due process by asserting exclusive jurisdiction over Federal constitutional challenges to its own rules and then dismissing substantial challenges to such rules without any hearing as to law or fact and without giving any opinion or reasons for the dismissal.

Respondents' brief, on behalf, inter alia, of the Ohio Supreme Court and its agents, not only confirms but also compounds the due process violation. Respondents herein include the Ohio Supreme Court (which has not asserted, corporately or individually, any claim of immunity) and various of its agents that are responsible for administering the Ohio courts' rules governing the practice of law. In its brief in this Court, for the first time, Respondents assert that the Ohio Supreme Court might have dismissed the complaint because it might lack the authority to grant declaratory relief.

The Respondents' brief thus sets up an objection to certiorari in the nature of a claim that the decision of the Ohio Supreme Court rests on "adequate state grounds." See Murdock v. Memphis, 87 U.S. (20 Wall) 590 (1875). However, Petitioners submit that the argument of the Ohio Supreme Court and its agents, far from

setting forth a valid bar to the review of the underlying constitutional question by this Court, has rather confirmed the fact that Petitioners have been denied due process in the Ohio courts.[1]

This Court has held that in order to bar Federal review of a substantial Federal claim, a state ground must be "adequate" and it must have "fair and substantial" support. Staub v. City of Baxley, 355 U.S. 313, 318-20 (1958); Brinkerhoff-Faris Trust Co. vs. Hill, 281 U.S. 673 (1930); Ward v. County Commissioners, 253 U.S. 17, 22 (1920).

As Mr. Justice Holmes said:

> "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail ... Whether the right was denied or not given due recognition by the state court ... is a question as to which the plaintiffs are entitled to invoke our judgment." Love v. Griffith, 266 U.S. 32, 33-34 (1924) quoted in Henry v. Mississippi, 379 U.S. 443 at 447 (1965).

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[1] Since the Ohio Supreme Court was one of the respondents on whose behalf the opposition brief was filed, one could assume that such a contention represents the position of that court. However, Respondents are careful to phrase their arguments in terms of what "might" have happened. Stembridge v. Georgia, 343 U.S. 541 (1952) relied upon by the Petition does indicate that the doctrine of adequate state grounds has been applied sometimes where the decision might have rested on adequate state grounds. "At this stage, the Supreme Court of Georgia, could have denied certiorari on adequate state grounds." 343 U.S. at 547. (emphasis added) The key word is adequate. If the grounds would have been insufficient to preclude review if made explicit, a fortiori they could not bar review where the fact of their application is only a possibility.

It can hardly be called fair and substantial that a state court admittedly arrogate to itself sole and exclusive jurisdiction over a First Amendment claim and then refuse to exercise that jurisdiction on tenuous grounds, thus completely foreclosing any forum to the complainant. Respondent Ohio Supreme Court admits that its original jurisdiction is founded in the Ohio State Constitution. Article IV, Sec. 2(B)(1), Ohio Constitution, (as set forth in the appendix to Respondents' brief) grants the Ohio Supreme Court original jurisdiction in matters involving "admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law." Respondent concedes that it claims:

> "exclusive and absolute authority over all matters relating to the practice of law in Ohio." (emphasis added) Respondents' brief, page 3, see also Smith v. Kates, 46 Ohio St. 2d 263 (1976).

(Significantly, Respondents do not suggest in their brief any other court in Ohio that might have jurisdiction over such claims.) The Ohio Revised Code, Section 2721.02 confers on all "courts of record" the power to issue declaratory judgments. The Ohio Supreme Court is unquestionably a court of record. In any event, as Respondents themselves point out, the question of remedy is not jurisdictional. Respondents' brief, page 3. Declaratory judgment would appear to be an appropriate remedy to ask a court to issue when the defendants are itself and its agents who are already subject to its administrative authority. Petitioners, in the standard form, did request that the Ohio Supreme Court "grant such other and further relief as the Court may deem necessary and proper." Complaint, page 5. Thus, if the Ohio Supreme Court had preferred to issue a writ of prohibition or a writ of mandamus, etc., it clearly had

the power to use an alternate remedy. [2] Respondent's contention that its consideration of the substantial Federal constitutional question posed by this case may have been precluded by the request for declaratory judgment (rather than some other remedy) can only be characterized a substantial attempt to erect a procedural bar, lacking in fair support.

That this Court prefers not to mire itself in the intracacies of state procedure is axiomatic and understandable. But it is equally well established that litigants' constitutional rights cannot go by default simply because a state court has invoked a dubious procedural objection to consideration of a substantial First Amendment claim, Staub v. City of Baxley, supra. Neither should this Court decline to consider an important constitutional issue of general interest simply because the case requires reviewing the adequacy of a state court's reasons for refusing to fairly consider a Federal constitutional claim. Henry v. Mississippi, supra.

This case thus involves two pressing constitutional issues: (1) the applicable standard of review in cases involving commercial (professional) free speech and (2) the intractable problem of inadequate state procedural grounds asserted to bar consideration of important Federal constitutional questions.

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[2] See Ohio Rules of Civil Procedure, Rule 54(c) made applicable to original actions in the Ohio Supreme Court, by Ohio Supreme Court Rules of Practice, Rule VIII, Section I. See Raimonde v. VanVlerah, 42 Ohio St. 2d 21 (1975), syllabus 3.

CONCLUSION

It is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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